Supreme Court, U.S.
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No. 00-9

IN THE

Supreme Court of the United States

GEMINI, INC.,

Petitioner,

v.

KATHERINE A. THORSON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF FOR PETITIONER

TERENCE M. FRUTH
DOUGLAS L. ELSASS
FRUTH & ANTHONY, P.A.
3750 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 349-6969

WILLIAM J. KILBERG, P.C.
Counsel of Record
THOMAS G. HUNGAR
JASON C. SCHWARTZ
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Gemini, Inc.

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RULE

SUP. CT. R. 10 1

REPLY BRIEF FOR PETITIONER

Respondent has identified no persuasive grounds for denying review in this case. Indeed, respondent fails to rebut the petition's showing that the decision below is inconsistent with cases from other circuits holding that after-acquired evidence can suffice to defeat an employee's claim of a "serious health condition" under the Family and Medical Leave Act ("FMLA"). Conceding that the rule of law in other courts is as stated in the petition, respondent attempts to avoid this issue by turning a blind eye to the holding of the court below. An examination of the court of appeals' opinion demonstrates, however, that the court held that an employer's after-acquired evidence is insufficient as a matter of law to rebut an employee's prima facie showing under the FMLA, thereby creating a circuit conflict with decisions of the Sixth and Seventh Circuits. As discussed herein, although a subsequent decision of the Eighth Circuit addresses the court of appeals' holding in this case, that recent decision fails to eliminate the potential for a continuing conflict with the law of other circuits on this significant issue.

In addition, respondent all but concedes that, as demonstrated in the petition, the decision below conflicts with precedents of this Court setting forth the principles of statutory construction that should govern this case. Accordingly, this Court's review is warranted. *See* SUP. CT. R. 10(a) and (c) (certiorari appropriate when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter" or "has decided an important federal question in a way that conflicts with relevant decisions of this Court").

I. Review Is Warranted Because The Court Of Appeals Held That After-Acquired Evidence Is Legally Insufficient To Rebut Employees' FMLA Claims

1. The court below held that an employer who fails to invoke the FMLA's optional medical certification mechanism effectively surrenders its right to challenge an employee's claim of entitlement to FMLA leave through the use of after-acquired evidence. In her brief in opposition, respondent asserts that the court below did not so hold. Instead, according to respondent, "the Court of Appeals commented on and ruled on the after-acquired evidence." Opp. 3 (citing Pet. App. 18a, 19a). Respondent's analysis is beside the point, however, because the rule of law adopted by the court below effectively precludes employers from obtaining summary judgment on the basis of after-acquired evidence.

The opinion of the court of appeals leaves no doubt on this point. After noting that Gemini did not invoke the medical certification process, the court of appeals expressly held that "in these circumstances, Gemini *cannot* show that there is a genuine issue of fact regarding [respondent's] incapacity during the February absences, *although it may have been able to do so (or even to prevail on this issue) had it availed itself of the protections provided for within the FMLA*." Pet. App. 18a (emphasis added); *accord id.* at 17a ("It may well be that [respondent's] illness did not actually require that she be absent from work, *but because the company did not resort to the protections for employers provided by the FMLA* to address just this sort of situation [*i.e.*, the optional medical certification process], there is no genuine issue of fact on this part of the 'serious health condition' question.") (emphasis added); *id.* at 19a ("In the face of the contemporaneous notes from Thorson's physician indicating that she was not to work, we agree with the District Court that Gemini *cannot show, with* its *evalua-*

tions made long after the fact, that there remains a genuine issue of material fact . . . .") (emphases added).

In short, the court of appeals repeatedly held that an employer "cannot" show the existence of a genuine issue of fact solely through the use of after-acquired evidence, not that Gemini "did not" make such a showing with the particular after-acquired evidence in this case. The court made clear that the reason for this inability to rebut the employee's prima facie showing was not some unstated flaw in the probative value of the evidence proffered by Gemini, but was instead "because the company did not resort to the protections for employers provided by the FMLA" (Pet. App. 17a) and sought to rely on "evaluations made . . . *after the fact*." *Id.* at 19a (emphasis added). To be sure, the court of appeals *mentioned* the after-acquired evidence presented by Gemini, but it did so only to express its conclusion that this evidence was legally insufficient to rebut respondent's claim to have suffered from a "serious health condition."

This reading of the court of appeals' decision is confirmed by the court's conclusion that summary judgment was appropriate because there was no genuine issue of material fact. The after-acquired evidence proffered by Gemini demonstrated that respondent had suffered from only "an upset stomach . . . without any significant gastrointestinal disease or pathology" and that there was no "obvious indication as to why it would require [her] to miss work." Pet. C.A. App. 495; *see* Pet. App. 19a. This evidence directly refuted respondent's claim to have suffered from a "'period of incapacity requiring absence from work'" (Pet. App. 8a (citation omitted)) and, if legally sufficient, would have raised a genuine issue of material fact that would have precluded entry of summary judgment for respondent. Thus, the court of appeals' judgment necessarily rests on its holding that Gemini's evidence was insufficient as a matter of law to create a jury issue because it was developed after the fact rather than through the contemporaneous certifica-

tion procedure. A rule that after-acquired evidence can be considered but is legally insufficient to rebut the plaintiff's prima facie case is, for all practical purposes, indistinguishable from a rule that precludes the introduction of such evidence, because under either rule the employer can never prevail on the basis of after-acquired evidence but is instead compelled to utilize the optional certification procedure. Thus, this rule conflicts with the decisions of the other courts of appeals cited in the petition, because those courts held that after-acquired evidence *can* create a triable issue of fact on the "serious health condition" issue.

A recent decision of the Eighth Circuit cites the decision below but does not eliminate the concerns raised by the opinion in this case. *See Stekloff v. St. John's Mercy Health Sys.*, No. 99-3016, 2000 WL 959613 (8th Cir. July 12, 2000). In *Stekloff*, the Eighth Circuit referred to the optional nature of the FMLA's medical certification process, and noted that an employer's failure to comply with that process would not result in a complete waiver of its right to contest an employee's assertion of a "serious health condition." *Id.* at *1. The court of appeals characterized the *Thorson* opinion as having "considered employer arguments that an employee did not have a serious medical condition in spite of the fact that no second opinion was sought." *Id.* However, the *Stekloff* court apparently was not squarely presented with the question whether after-acquired evidence is legally sufficient to defeat an employee's prima facie case; instead, the court was faced with a unique issue concerning the viability of a claim of a serious health condition when an employee is able to work in a similar job in another workplace, and the employee claims that her health condition is precipitated by conditions distinctive to her previous workplace. *Id.* at *2. The court ultimately seems to conclude as a matter of law that the employee established that she suffered from a "serious health condition." *See id.* at *4 ("Ms. Stekloff made a sufficient showing . . . which allows us to *conclude* that

she had a 'serious health condition.'") (emphasis added); *see also id.* ("Ms. Stekloff's leave is protected by the FMLA even if she was continuously able to work as a psychiatric nurse for some other employer."). It is difficult to discern what rule of law the Eighth Circuit would apply in future cases in light of the rather arcane and unrelated issue that arose in *Stekloff*. Further, *Stekloff* does not eliminate the circuit conflict created by the decision below, and there remains a significant amount of confusion as to the rule of law concerning the weight to be given to after-acquired evidence in FMLA cases.

2. As demonstrated above, in this case the court of appeals essentially decided that an employer who fails to invoke the FMLA's optional medical certification process is precluded from successfully using after-acquired evidence to rebut an employee's claim of a "serious health condition." Given that rule of law, which was not wholly disclaimed in *Stekloff*, the first question addressed in the petition is squarely implicated here, and respondent offers no arguments to the contrary. Indeed, respondent correctly concedes that the law in other circuits expressly permits employers to use after-acquired evidence to rebut a plaintiff's prima facie showing of a "serious medical condition." *See* Opp. 3-4 (conceding that in "*Bauer v. Variety Dayton-Walther Corp.*, 118 F.3d 1109, 1112 (6th Cir. 1997), the Sixth Circuit . . . allowed the after-acquired evidence").

Respondent attempts to distinguish *Price v. City of Fort Wayne*, 117 F.3d 1022 (7th Cir. 1997), on the ground that it "dealt with the Certification process," but that purported distinction is of no consequence. As explained in the petition, *Price* is consistent with the approach followed by the Sixth Circuit in *Bauer*, because the *Price* court contemplated the use of after-acquired evidence notwithstanding the fact that the employer failed to comply with the requirements of the FMLA medical certification process. Pet. 9. Thus, like the Sixth Circuit's decision in *Bauer*, the Seventh Circuit's

holding in *Price* is irreconcilable with the judgment in this case.

On the other hand, the holdings in *DeLong v. Trujillo*, 1 P.3d 195, 200 (Colo. Ct. App. 1999), *cert. granted*, (May 30, 2000), and *Williams v. Rubicon, Inc.*, 754 So. 2d 1081, 1084-87 (La. Ct. App. 1999), *writ denied*, 752 So. 2d 864 (La. 2000), are consistent with the approach of the court of appeals. To be sure, both of those cases involved the optional certification procedure, but the crucial point is that in both cases—as in the decision below—the practical effect of the employer's failure to follow the optional certification process to its conclusion was that the employer was precluded as a matter of law from challenging the employee's FMLA claim. *DeLong*, 1 P.3d at 200; *Williams*, 754 So. 2d at 1084-87.

II. The Decision Below, Which Permits An Agency To Adopt Rules Beyond The Authority Delegated To The Agency By Congress, Conflicts With The Clear Mandates Of This Court

Respondent similarly fails to rebut Gemini's showing that the decision below conflicts with this Court's clear directives regarding the limitations on agency rulemaking authority. The court of appeals' decision permits an agency to promulgate regulations beyond the authority delegated to it by Congress as long as the agency "reasonably decided" that exceeding Congressionally mandated limits "would be a legitimate tradeoff" for having an objective definition that could be applied uniformly. Pet. App. 16a. On this point, respondent simply notes that the opinion below contained an "exhaustive" analysis of this issue. Opp. 4. Respondent's characterization does not change the fact that the court of appeals upheld an agency regulation while essentially conceding that the regulation expanded the "serious health condition" category beyond the limits envi-

sioned by Congress. Pet. App. 16a. No matter how thorough the analysis that led to the court of appeals' conclusion, its holding directly conflicts with the precedents of this Court on an important issue of agency authority, and certiorari is therefore warranted.

Respondent asserts that acceptance of Gemini's view of the law would require this Court to overrule numerous lower court precedents. Opp. 5-7 (citing cases). That assertion is debatable,[1] but in any event it

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[1] Indeed, some of the cases cited by respondent note that the regulations exceed the limits envisioned by Congress, but find it unnecessary to choose between the regulations and the statute on the particular facts before them. For example, in *Beal v. Rubbermaid Comm. Prods. Inc.*, 972 F. Supp. 1216, 1223-26 (S.D. Iowa 1997), *aff'd*, 149 F.3d 1186 (8th Cir. 1998) (table), one of the plaintiffs suffered from a minor back injury that arguably satisfied the regulatory criteria for a "serious health condition." *Id.* at 1223. The court noted, however, that "it is unlikely that Beal's relatively minor back injury is the type of injury Congress intended to cover under the FMLA." *Id.* The court expressed skepticism about its ability to interpret the regulations to expand the scope of the FMLA beyond the intent of Congress, but ultimately resolved the claim on another basis. *See id.* ("[E]ven if the court believed that it could stretch the limits of the FMLA so as to include Beal's back injury within the concept of 'serious health condition,' Beal has submitted no evidence to establish that Defendant interfered with the exercise of any rights he may have had under the FMLA."); *see also Brannon v. Oshkosh B'Gosh, Inc.*, 897 F. Supp. 1028, 1036 n.8 (M.D. Tenn. 1995) ("When considered together with the legislative history, the Department of Labor's test will include many more ailments than Congress intended the FMLA to cover. Furthermore, the regulation excludes spe-

[Footnote continued on next page]

does not refute the justifications for granting review in this case. Indeed, if large numbers of lower courts are, like the court below, choosing to disregard this Court's precedents regarding the limitations on the lawmaking authority of federal agencies, the need for immediate review is even more compelling. Accordingly, this Court should grant review in order to reaffirm the principle, rejected by the court below, that an agency may not exceed the rulemaking authority delegated to it by Congress in the interests of administrative efficiency or ease of application. *See Sullivan v. Zebley*, 493 U.S. 521 (1990).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

August 15, 2000

TERENCE M. FRUTH
DOUGLAS L. ELSASS
FRUTH & ANTHONY, P.A.
3750 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 349-6969

WILLIAM J. KILBERG, P.C.
Counsel of Record
THOMAS G. HUNGAR
JASON C. SCHWARTZ
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Gemini, Inc.

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cific illnesses such as the flu, while providing FMLA protection to those that are arguably less serious.").